BLANK

PAGE

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 19 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

Case No. 714

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

versus

J. H. HODGES and BROTHERHOOD OF RAILROAD TRAINMEN,
Respondents.

BRIEF OF J. H. HODGES AND BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF ATLANTIC COAST LINE RAILROAD COMPANY

SAM D. HEWLETT, JR.
Suite 1313 Fulton National Bank Building
Atlanta, Georgia 30303
Attorney for Respondents

BLANK

PAGE

INDEX

	Page
Questions Presented	1
Statutory Provisions Involved	1
Statement of Facts	2
Reasons for Denying Writ of Certiorari	6
Conclusion	12
CITATIONS	
Belk v. Allied Aviation Service Co. of New Jersey, Inc., 315 F.2d 513, certiorari denied 84 S.Ct. 1343, 377 U. S. 937, 12 L.Ed.2d 301	7
Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers, 370 U. S. 254, 82 S.Ct. 1346, 8 L.Ed.2d 474	7, 8
Gunther v. San Diego A.E.R. Co., 382 U. S. 257 (1965)	8
Peacock v. Walker, 213 Ga. 628, 100 S.E.2d 575	7
James Richardson & Sons v. W. E. Hedger Transportation Corp., 2 Cir., 98 F.2d 55	9
Sigfred v. Pan American World Airways, 230 F.2d 13 (4), 17	8
STATUTES:	
Railway Labor Act:	
44 Stat. 577 (1926), as amended, 45 U.S.C., paragraphs 151, et seq.	1
Paragraph 3 First, 44 Stat. 578 (1926), as amend, 45 U.S.C., paragraph 153 First	9
Public Law 89-456, 80 Stat. 208 (1966)	9
MISCELLANEOUS:	
S. Report No. 1201, 89th Congress, 2d Session (1966)	9

BLANK

PAGE

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1966

Case No.

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

versus

J. H. HODGES AND BROTHERHOOD OF RAILROAD TRAINMEN,
Respondents.

BRIEF OF J. H. HODGES AND BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF ATLANTIC COAST LINE RAILROAD COMPANY

QUESTIONS PRESENTED

(1) Do the provisions of Section 3, First, of the Railway Labor Act (45 U.S.C.A. 153, as amended specifically by Public Law 89-456, 80 Stat. 208 (1966) permit the railroad to assert the defense of equitable estoppel against an enforcement of an award rendered by the National Railroad Adjustment Board?

(2) If the above issue is answered in the affirmative, which respondents contend it should not, can the carrier urge as a defense equitable estoppel where the National Railroad Adjustment Board held it was

not a proper defense because the carrier did not properly raise it in administrative proceedings in compliance with the contract between it and the Brotherhood of Railroad Trainmen?

(3) Is an award of the National Railroad Adjustment Board which is valid on its face final and binding as to all findings of fact and law pertaining to a claim submitted to it and over which the Board has jurisdiction?

STATEMENT OF FACTS

Respondents do not agree with the statement of facts set forth in the petition for a writ of certiorari and wish to add other very pertinent facts.

Additional Facts

In December of 1956, at the trial of this case in the plaintiff's suit for damages against the carrier, the following pertinent evidence was given by the plaintiff:

(R. 55)

"Q. . . . do you feel that you can do this work with your foot?

A. No, sir."

Respondents contend that this question and answer related to the present tense, and petitioner did not state that he could not do this work in the future (R. 55).

Dr. Allgood testified (R. 58):

"Q. Do you think he will be able to climb up and down moving box cars or jump off and on moving cars?

A. I don't think so. I wouldn't recommend it to him. He might be able to do it a few times and get by with it, but I doubt that he would be able to do it as a routine thing.

Q. Now, your appraisal of disability; I believe you said 40% disability of the toe, is it not?

A. No, that is of the foot as a whole.

Q. Foot as a whole?

A. Leg as a whole.

Q. But so far as employment is concerned, he would be disabled for such employment, or not disabled, depending on what that employment would be, is that correct?

A. Depending on what he is able to do. If you will remember, I gave that disability for average manual labor. For example, he might be very slightly disabled for doing office type work.

Q. Or even for doing manual labor which enabled him to sit at a bench or operate a machine?

A. That's right; but probably even higher than 40% for doing the work he was doing.

Q. But for standing work —

A. For work that required standing and using the foot during the entire time he is on duty, he might be 100% disabled from doing the work he was doing previously, but based on the amount of pain and the other things that I have mentioned, for what I would say average manual labor, it is based on that."

In plaintiff's damage suit, Dr. Allgood, who testified for plaintiff, was asked:

> (R. 58):
> "Doctor have you formulated from your examination of Mr. Hodges any idea of what percentage of disability you feel that he is suffering *now* as to his foot as a whole?" (Emphasis supplied)

The doctor's testimony at all times related to the plaintiff's present disability. He was never asked to express an opinion as to any future disability, nor was he asked to express an opinion as to how long the plaintiff would be disabled.

The award of the National Railroad Adjustment Board reveals (R. 14):

After the trial of J. H. Hodges' suit, a verdict was rendered for $22,005.28 on December 6, 1956. (The actual amount sued for was $75,000.00). On April 29, 1957, the carrier relieved Hodges of his rule book and switchkey without any notice of investigation, or investigation, in compliance with the contract. The Brotherhood protested to the carrier that Hodges had been removed without the carrier complying with Article 31(a) of the contract between the carrier and the Brotherhood. After some correspondence, the Brotherhood was informed that the plaintiff was no longer an employee and that his name had been removed from the seniority roster. Thereafter, the Brotherhood filed a claim with the National Railroad Adjustment Board alleging that the action of the carrier in removing Hodges' name from the seniority list and

denying him the right to return to work, or even the right to have a physical examination to determine his ability to return to work, constituted a violation of the contract agreement between the carrier and the Brotherhood, to-wit, Article 31(a), as follows:

> "A trainmen will not be discharged without an investigation."

At the hearing before the Board, the carrier contended that since Hodges had brought suit against it and recovered for permanent injuries, the carrier was under no compulsion to retain Hodges in its employment, and Hodges was estopped to claim he should be retained in its employment. The Board refused to apply the doctrine of estoppel for two reasons (R. 14):

(1) That the carrier could have brought charges against Hodges, had an investigation under Article 31(a) of its contract with the Brotherhood, proved the facts of disability and of the damage suit, and pleaded estoppel as to Hodges; and if they had done so, the Board would have had this issue before it. *But, since they did not do this,* the only issue before the Board was: Did the carrier violate its contract with the Brotherhood by not having an investigation as required by Article 31(a) and refusing to retain Hodges in its employment (R. 14).

(2) That since the parties were not the same, an estoppel against Hodges (if such there was) could not be urged as a defense against the Brotherhood (R. 14).

The Board found that Hodges had been released from his employment in violation of Article 31(a) of the contract between the parties (R. 14).

REASONS FOR DENYING THE WRIT OF CERTIORARI

(1) The only grounds on which an award may be set aside are enumerated in Public Law 89-456, and the Congress, by this amendment to the Railway Labor Act, has made the award of the Board final and binding as to all parties except in those specified exceptions. Since the grounds set forth in petitioner's application for the writ plainly show they do not come under the provisions authorizing the setting aside of an award, the writ should be denied.

The grounds for setting aside an award are here set out in substance:

> (a) A failure of the division to comply with the requirements of this Act.
>
> (b) For failure of order to conform or confine itself to matters within the scope of the division's jurisdiction.
>
> (c) For fraud or corruption of a member of the division making the order.

Congress, in passing the Railway Labor Act and setting up the Board, intended a speedy end to disputes between carriers and their employees, as a reading of the Congressional reports shows, and this case is an excellent example of what the act was passed to prevent. The record shows that this case has been in

dispute or litigation for over nine years, and the carrier is still trying to relitigate issues decided by the Board, which Congress intended to be final and binding on both parties.

(2) In argument on question number (2), it is our position that the carrier deliberately violated its contract with the Brotherhood and in effect "took the law in its own hands", and when a claim of such violation was made against it, tried to plead that Hodges was estopped by a recovery in his damage suit. If the carrier had complied with its contract, the issue of whether or not Hodges was permanently disabled from railroading and the question of estoppel could have been investigated and such issues would have been before the Board. Since the carrier did not comply with its contract, the Board was correct in holding that estoppel was not before it.

In *PEACOCK v. WALKER*, 213 Ga. 628 (100 S.E.2d 575), the court said:

> "If a party has a good defense at law, and from negligence fails to set it up at the proper time, he must suffer the consequence of his own laches. . ."

Both carrier and Brotherhood are obligated to comply with the contract.

In *BELK v. ALLIED AVIATION SERVICE CO. OF NEW JERSEY, INC.*, 315 F.2d 513, certiorari denied 84 S.Ct. 1343, 377 U.S. 937, 12 L.Ed.2d 301, citing on page 517 from *Drake Bakeries, Inc. v. Local 50, American*

Bakery & Confectionery Workers, 370 U.S. 254, 82 S.Ct. 1346, 8 L.Ed.2d 474, the court stated:

> ". . . There the company action for breach of a no-strike provision was dismissed, the Court holding that arbitration of this alleged breach was a prerequisite to suit. . ."

Since the employer did not proceed under the provisions of the contract, appellant contends that a failure to offer a defense which could have been urged in such administrative proceedings prior to the Board hearing was a waiver of such defense.

The carrier in this case is attempting to indirectly do what *GUNTHER v. SAN DIEGO A.E.R. CO.*, 382 U.S. 257 (1965) says cannot be done by asking this Court to go into the merits of the award of the Board.

(3) With reference to the third question presented, it is our position that the carrier is also asking this Court to review a challenged ruling of law made by the Board based on the facts of the case. The Fifth Circuit Court of Appeals has made a ruling in a similar circumstance in the case of *SIGFRED v. PAN AMERICAN WORLD AIRWAYS*, 230 F.2d 13 (4), 17, as follows:

> "In the light of the declared aims of the Act, we also find it to be the intent of Congress to allow the parties to make the awards of such boards final and binding. Therefore . . . we refuse to review a challenged ruling of law, there being no question raised regarding the jurisdiction of the board or the regularity of

its proceeding. *James Richardson & Sons v. W. E. Hedger Transportation Corp.*, 2 Cir., 98 F.2d 55."

The case cited in the Fifth Circuit Court's opinion above is especially applicable to this case since the Supreme Court has held that the "Adjustment Board's provisions were to be considered as 'compulsory arbitration in this limited field'" and we quote from headnote 3 of the cited case:

> "The Circuit Court of Appeals cannot amend or overrule award of arbitrators merely because of disagreement with matters of law or facts determined by the arbitrators."

We call the Court's attention to certain Committee Reports of Congress which clearly show the intent of Congress in passing Public Law 89-456:

Senate Report No. 1201 — 89th Congress, 2nd Session, accompanied H.R. 706, Public Law 89-456, passed by the House February 9, 1966, by the Senate June 7, 1966, and approved June 20, 1966, amended 45-153, and struck from Section 3, First, (p), of such act, the words:

> "shall be prima facie evidence of the facts therein stated"

and inserted in lieu thereof:

> "shall be conclusive on the parties."

Thus judicial review was eliminated except as to a limited review.

The purposes of the bill are set out in the report on pages 1, 2 and 3, as follows:

"Purpose"

"The principal purpose of the bill is to eliminate the large backlog of undecided claims of railroad employees pending before the National Railroad Adjustment Board, to expedite disposition of grievances and disputes over the interpretation and application of agreements, and to provide equal opportunity for limited judicial review of awards of the Board to employees and employers."

"Judicial Review"

"Under Section 3, First, (p) of the act, provision is made for court enforcement of awards rendered in favor of employees. Such an employee may bring action in the U. S. District Court to enforce said award. The findings and orders of the Board shall be prima facie evidence of the facts as stated in the award. There is no other provision for judicial review of decisions of the National Railroad Adjustment Board.

"This results in the incongruous situation that if an employee receives an award in his favor from the Board, the railroad affected may obtain judicial review of that award by

declining to comply with it. If, however, an employee fails to receive an award in his favor, there is no means by which judicial review might be obtained. The committee believes that this result is unfair to employee and that an equal opportunity for judicial review should be provided under the act. Also, because the National Railroad Adjustment Board has been characterized as an arbitration tribunal by the courts, the grounds for review should be limited to those grounds commonly provided for review of arbitration awards. H. R. 706 provides an equal opportunity for judicial review and limits that review for 'failure of the division to comply with the requirements of this act, for failure of the order to conform, or confine itself to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.' ".

We do not feel that the Court should consider the merits of petitioner's argument that Hodges was estopped by his recovery in the damage suit since the carrier did not raise the issue at the proper time and place, but we do wish the Court to know that we contend Hodges was *not* estopped since he did not allege he would never be able to work on the railroad and all the evidence related to present disability and none to any future disability.

CONCLUSION

It is very obvious in any personal injury claim that a man can have a permanent disability of a member of his body without actually being totally and permanently disabled from railroading. It will be noted that the plaintiff did not claim in his suit that he was totally and permanently disabled from railroading. He merely stated that his injuries were permanent in character. A man could lose an ear, which would be a totally and permanently disabling injury, but would not necessarily totally and permanently disable him from railroading. This is also true in the instance of men who have lost fingers and who are still working for the railroad. It is common knowledge that in times past the railroads have permitted men to work with one eye, although this practice is not generally followed now because of safety reasons. Further, a man who is employed by the railroad can be totally and permanently disabled from performing the work of a switchman, but would not necessarily be totally and permanently disabled from performing the work of a passenger conductor or a through freight conductor. Therefore, claimant's petition could not be urged as an equitable estoppel under any circumstances because neither the plaintiff's petition nor the evidence shows that the plaintiff was totally and permanently disabled from railroading. This, we urge and insist upon even though we contend we are perfectly correct in our interpretation of the *Gunther* case, that the award of the National Railroad Adjustment Board is final and binding and cannot be disturbed.

Further, Public Law 89-456 clearly limits the jurisdiction of federal courts to the enforcement of ad-

justment board awards except as to the three limited issues provided in that law; that Congress has clear authority to limit the judicial review of administrative determinations even while such determinations are before the courts.

Respectfully submitted,

SAM D. HEWLETT, JR.
Attorney for Respondents

Suite 1313 Fulton National Bank Building
Atlanta, Georgia 30303
Telephone: 522-8441

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been furnished to counsel of record for petitioner for writ of certiorari, by depositing a copy of same in the United States Mail, with sufficient postage thereon, this _____ day of _____, 1966.

SAM D. HEWLETT, JR.
Attorney for Respondents